

EMPLOYMENT STANDARDS TRIBUNAL

An appeal
pursuant to section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

- by -

Reitinder Braich
("Ms. Braich")

- of a Determination issued by -

The Director of Employment Standards

PANEL: Shafik Bhalloo, K.C.
SUBMISSION: Reitinder Braich, on her own behalf
FILE NUMBER: 2024/066
DATE OF DECISION: September 11, 2024

DECISION

OVERVIEW

1. This is an appeal by Reitinder Braich (“Ms. Braich”) of a decision of a delegate of the Director of Employment Standards (“Director”) issued on May 2, 2024 (“Determination”).
2. On December 18, 2022, Ms. Braich filed a complaint under section 74 of the *Employment Standards Act (ESA)* with the Director alleging that her former employer, Vancouver Horror Nights Entertainment Inc. (“Employer”), had contravened the *ESA* by failing to pay her regular and overtime wages, failing to reimburse her for business costs she incurred on the Employer’s behalf, and failing to pay her compensation for length of service (“Complaint”).
3. In investigating the Complaint and making the Determination, the Director followed a two-step process. One delegate of the Director (“investigative delegate”) corresponded with the parties and gathered information and evidence. Once that process was completed, the investigative delegate prepared a report (“Investigation Report”) summarizing the results of the investigation which was sent to the parties for review and comment. Upon receiving the responses to the Investigative Report and the replies to those responses, the matter was sent to a second delegate (“adjudicative delegate”) who assumed responsibility for reviewing the responses and any replies and issuing the Determination pursuant to section 81 of the *ESA*.
4. The Determination found that the Employer violated Part 3, sections 17 and 18 (payment of all wages owing) and section 21 (business costs/deductions); and Part 7, section 58 (vacation pay) of the *ESA* in respect of the employment of Ms. Braich.
5. The Determination ordered the Employer to pay wages to Ms. Braich in the total amount of \$3,651.88 including accrued interest.
6. The Determination also levied five administrative penalties of \$500 each against the Employer for contravention of sections 17, 18, 21, and 28 of the *ESA* and section 46 of the *Employment Standards Regulation (“Regulation”)*.
7. In the Appeal Form, Ms. Braich has checked off all three available grounds of appeal, namely, the Director erred in law, failed to observe the principles of natural justice in making the Determination, and evidence has become available that was not available at the time the Determination was being made.
8. Section 114(1) of the *ESA* provides that the Tribunal may dismiss all or part of an appeal without seeking submissions from the other parties or the Director if it decides that the appeal does not meet certain criteria. After reviewing the appeal submissions, I find it is unnecessary to seek submissions on the merits from the Employer or the Director.
9. My decision is based on the section 112(5) record (“record”) that was before the Director at the time the Determination was made, the appeal submissions of Ms. Braich, the Determination, and the Reasons for the Determination (“Reasons”).

ISSUE

10. The issue to be considered at this stage of the proceeding is whether the appeal should be allowed to proceed or dismissed under section 114(1) of the *ESA*.

THE DETERMINATION AND THE REASONS

Background

11. According to a BC Registry Services Searches conducted online on April 10, 2024, with a currency date of December 28, 2023, the Employer was incorporated in British Columbia on October 21, 2020. No active Directors were listed in the search, but four officers are shown including particularly Przemek Cerazy, Mark Friebe (“Mr. Friebe”), Adam Moore (“Mr. Moore”), and Dustin Stratford. According to a notice of change of directors filed on August 23, 2023, Mr. Moore ceased being a director on March 15, 2023. According to a notice of change of directors filed on February 24, 2023, Mr. Friebe ceased being a director on June 1, 2022, and lists Mr. Moore as the sole director at that time.
12. The Employer operated a haunted house attraction in Vancouver. The business closed on November 5, 2022. Ms. Braich was hired as a Costume Director in July 2022. The parties disputed whether Ms. Braich began on July 13 or July 25, 2022. The Employer suspended Ms. Braich on September 2, 2022, and terminated her employment on September 6, 2022. Although Ms. Braich continued to work as an independent contractor after termination, the parties agreed that the employment relationship officially ended on September 6, 2022. Ms. Braich’s salary was \$3,800 per month with 4% vacation pay.
13. As indicated by the adjudicative delegate in the Reasons, there were three issues before him:
- (i) Was Ms. Braich owed wages?
 - (ii) What amount of business costs did Ms. Braich incur on behalf of the Employer and which, if any, of those costs were not reimbursed?
 - (iii) Was Ms. Braich owed compensation for length of service?
14. Although I have thoroughly reviewed the record and the Reasons, I will only emphasize the relevant evidence and analysis in the Reasons as required or necessary to address the appeal.
15. It should be noted that in the investigation of the Complaint, both Ms. Braich and the Employer were afforded ample opportunity to and did present their evidence which the investigating delegate incorporated in their Investigation Report issued on January 8, 2024. The adjudicative delegate reviewed the information in the Complaint file including the Investigation Report and the submissions and arguments provided by the parties in response to the Investigation Report.
16. It is also important to note that in the investigation of the Complaint, Ms. Braich requested and was granted multiple extensions to submit additional evidence. Initially, she was given until February 28, 2024, to respond to a request for information. On February 28, 2024, she received a further extension until March 4, 2024. This was the final extension, but she requested more time on March 4, 2024, which was denied. She subsequently submitted additional information on March 5, 2024, which was

disclosed to the Employer on March 6, 2024. She then submitted further unsolicited information on March 17, March 19, and April 10, 2024. This late information was not disclosed to the Employer. Despite the lack of disclosure, the adjudicative delegate reviewed Ms. Braich's late submissions and found that they either lacked probative value or were unreliable, so the Employer was not prejudiced by their non-disclosure.

17. With respect to the first issue, whether Ms. Braich was owed any regular or overtime wages, the adjudicative delegate evaluated the evidence related to Ms. Braich's work hours and wage payments. Ms. Braich claimed her employment began on July 13, 2022, supported by an email from Mr. Purdy, her supervisor, and bank records showing an early payment. The Employer argued her start date was July 25, 2022, but had no contemporaneous records of the days and hours she worked. The adjudicative delegate found Ms. Braich's evidence more credible and confirmed her start date as July 13, 2022.
18. Although Ms. Braich submitted various hour logs, these were created after the Investigation Report and contained inconsistencies, leading to their rejection by the adjudicative delegate as unreliable. The adjudicative delegate noted that many of the logs were internally inconsistent and failed to provide a clear record of hours worked. In the absence of reliable evidence from Ms. Braich, the adjudicative delegate accepted that she worked 40 hours per week, as per her employment contract, from July 13, 2022, until her suspension on September 2, 2022.
19. The adjudicative delegate calculated Ms. Braich's total gross regular wages at \$6,387.49. After accounting for the payments made by the Employer—\$1,669.00, \$1,500.00, and \$287.07—Ms. Braich was found to be owed \$2,931.42 in regular wages. There was insufficient evidence to support that she worked more than 8 hours per day or 40 hours per week, therefore, no overtime wages were awarded. Additionally, Ms. Braich was entitled to vacation pay at 4% of her total wages, amounting to \$255.50, as there was no evidence she had received vacation pay. In summary, the adjudicative delegate concluded that Ms. Braich was owed \$2,931.42 in regular wages and \$255.50 in vacation pay, with no overtime wages due.
20. Regarding the second issue—determining the amount of business costs incurred by Ms. Braich on behalf of the Employer and identifying any unreimbursed costs—the adjudicative delegate noted that under subsection 21(1) of the *ESA*, employers are prohibited from withholding or deducting any part of an employee's wages except as required or permitted by law. Similarly, subsection 21(2) forbids employers from requiring employees to cover business expenses. Ms. Braich argued that the Employer breached these provisions by mishandling several business-related expenses.
21. Firstly, regarding the sewing machines Ms. Braich purchased, she paid \$1,600 for these items, which the Employer reimbursed in full during the investigation. Since the reimbursement was complete, the adjudicative delegate concluded no further payment for the sewing machines was owed to Ms. Braich.
22. With respect to expenses Ms. Braich incurred in reimbursing her assistants for business costs they incurred on behalf of the Employer, she initially reported \$1,096.30 in expenses but, upon review of bank records, it was found that the actual amount was \$1,118.88. The Employer had reimbursed Ms. Braich \$1,019.40, leaving an outstanding balance of \$99.48. Therefore, the adjudicative delegate ordered that Ms. Braich was owed this amount to cover the discrepancy.

23. For supplies and materials Ms. Braich purchased on behalf of the Employer, she claimed \$2,973.61 in expenses but did not provide receipts to substantiate these claims. The Employer accepted \$467.19 in expenses, supported by receipts found in the costume room, and disputed the remaining claims. The adjudicative delegate decided in favour of the Employer's position because Ms. Braich's evidence lacked the necessary detail and itemization. The list of claimed expenses by Ms. Braich was vague, providing only transaction dates and amounts without specific descriptions or item costs. Furthermore, although Ms. Braich's bank statements indicated expenses that aligned with the claimed amounts, the lack of itemized receipts and detailed evidence made it difficult for the adjudicative delegate to validate additional claims. As a result, only the \$467.19 acknowledged by the Employer was deemed reimbursable by the adjudicative delegate.
24. Regarding fuel expenses she alleged to have incurred while driving her personal vehicle while performing work for the Employer by driving to various stores to make purchases of supplies and materials, Ms. Braich claimed \$517.97. However, she did not provide evidence regarding the distance driven or the proportion of fuel used specifically for work versus personal use. Additionally, the fuel expenses were claimed over a period extending before any business-related purchases were documented. Due to the absence of detailed usage information, the claim for fuel expenses was denied by the adjudicative delegate.
25. With respect to bank fees of \$14.00 Ms. Braich incurred from her bank due to bounced pay cheques from the Employer's account, the adjudicative delegate determined that these fees were directly related to the Employer's insufficient funds, and therefore, they were deemed valid business expenses. The adjudicative delegate ordered these fees reimbursable by the Employer.
26. Lastly, regarding the statutory deductions made from her wages by the Employer, Ms. Braich contested the amounts deducted and alleged that some were not remitted to the Canada Revenue Agency (CRA) and sought to recover these amounts from the Employer. The adjudicative delegate determined that since the *ESA* permits employers to withhold statutory deductions and disputes over remittances to the CRA are beyond the Director's jurisdiction, the Employer's actions in this regard did not contravene the *ESA*.
27. With respect to the third issue – whether Ms. Braich is owed compensation for length of service – the adjudicative delegate concluded that Ms. Braich is not entitled to compensation for length of service because she was employed for less than the three-month minimum required under section 63 of the *ESA*.
28. With respect to administrative penalties, the adjudicative delegate found the Employer was in violation of several provisions of the *ESA*. Under section 17, the Employer failed to pay Ms. Braich her wages earned for multiple pay periods, including the last full pay period from August 10 to 23, 2022, resulting in a \$500.00 penalty. Additionally, the Employer did not pay all owed wages, including vacation pay, within 48 hours of her termination on September 8, 2022, leading to another \$500.00 penalty under section 18. The Employer also improperly required Ms. Braich to cover business costs, contrary to section 21, which resulted in a \$500.00 penalty. Furthermore, the Employer failed to maintain required payroll records, including the days and hours worked, as mandated by section, incurring an additional \$500.00 penalty. Lastly, the Employer did not comply with a Demand for Employer Records issued on July 20, 2023, and failed to produce the required records by the August 10, 2023, deadline, leading to a \$500.00 penalty for contravening section 46 of the *Regulation*.

29. The Determination was issued on May 2, 2024. The deadline for filing an appeal was 4:30 p.m. on June 10, 2024. On the final date for appeal, Ms. Braich filed an incomplete appeal of the Determination, attaching some of her reasons, arguments, and supporting documents. She also checked the box on the appeal form acknowledging that she was not submitting a complete appeal before the expiry of the statutory appeal period. She also requested an extension of time to provide further submissions to June 20, 2024.
30. On June 12, 2024, the Tribunal informed Ms. Braich that her request for an extension to provide additional reasons and arguments and any supporting documents was granted, and she should provide her materials to the Tribunal by 4:00 p.m. on June 20, 2024.
31. On June 18, 2024, Ms. Braich asked the Tribunal for a further extension of the deadline to provide her reasons, arguments and documents to July 29, 2024, because it was a busy season for her at work. She then corrected her request with a follow-up email on the same day seeking the extension to June 28, 2024.
32. On June 19, 2024, the Tribunal granted Ms. Braich's request for an extension to 4:00 p.m. on June 28, 2024.
33. On June 28, 2024, Ms. Braich submitted her additional reasons, arguments, and supporting documents in the appeal. She also requested an extension until 9:00 a.m. on July 2, 2024, to submit the final set of documents. In her submission, Ms. Braich described the materials provided as a "very crude 1st version" of the evidence related to her purchases on behalf of the Employer. She indicated that she would submit a "perfected, complete document and notarized affidavit" from her witness before 9:00 a.m. on July 2, explaining that her illness that week and the use of an outdated laptop had made the process exceptionally time-consuming.
34. On July 2, 2024, by email of 7:48 a.m. to the Tribunal, Ms. Braich requested an extension to provide her additional documents by 4:00 p.m. on the same date.
35. On July 2, 2024, at 8:31 a.m., the Tribunal responded to Ms. Braich's earlier email and granted her an extension to provide her additional documents to the Tribunal by 4:00 p.m. on July 2, 2024.
36. On July 2, 2024, at 3:53 p.m. and 3:58 p.m. respectively, Ms. Braich sent two emails to the Tribunal. The first email contained an affidavit from her witness, Halley Fullford, a former employee with the Employer. The second email included 56 pages of documents, primarily consisting of pictures of costumes she made for or purchased on behalf of the Employer, along with her explanations of the amounts she expended on these costumes and materials.
37. On July 2, 2024, at 4:16 p.m., after the expiry of the extension granted to her by the Tribunal to provide her additional documents, Ms. Braich emailed additional unsolicited written submissions in support of her appeal.
38. On July 15, 2024, the Tribunal notified the Director that Ms. Braich had filed an appeal of the Determination under section 112 of the *ESA*. The Tribunal disclosed the appeal and Ms. Braich's submissions to the Director, indicating that no submissions were currently being sought from the Employer or the Director regarding the extension request or the appeal's merits. The Tribunal also

requested that the Director provide a copy of the record to both the Tribunal and Ms. Braich. The Tribunal did not ask the Director to disclose the record to the Employer because the Tribunal did not have the Employer's current contact information, and the Employer's business had closed on November 5, 2022.

39. On July 22, 2024, the Director sent a copy of the record to the Tribunal and Ms. Braich.
40. On August 1, 2024, the Tribunal instructed Ms. Braich to review the record and submit written comments on its completeness by 4:00 p.m. on August 16, 2024.
41. On August 21, 2024, the Tribunal informed the parties that no objections to the completeness of the record had been received. The Tribunal also advised the parties that a panel had been assigned to decide the appeal. If the panel determines that the appeal or part of it should be dismissed, it will issue a decision accordingly. If the appeal is not dismissed, the Tribunal will request submissions from the Director on the merits of the appeal.

MS. BRAICH'S SUBMISSIONS

42. In the preamble to her written appeal submissions filed on June 10, 2024, Ms. Braich seeks a revised calculation of the reimbursement owed to her for business expenditures incurred during her employment as a costume design director for the Employer. She argues that the Determination was flawed due to fraudulent claims and misrepresentations made by the Employer, which necessitates a reassessment based on additional evidence she plans to present to the Tribunal.
43. Under the heading "Natural Justice" in her submissions, Ms. Braich alleges that the Employer, specifically through Mr. Moore, the Employer's CEO, committed multiple instances of perjury in their signed statements submitted to the Employment Standards Branch. She argues that these fraudulent assertions and misrepresentations concerning her business expenditures, which she only discovered after the Determination was made, undermine the fairness of the process. Furthermore, she contends that the Employer's dishonesty and the theft of her receipts have compelled her to prepare a detailed and extensive defense. Although she was granted "some extensions" by the Director to submit evidence supporting the hours she worked, she requires additional time to provide further documentation of the purchases she made for the Employer that were not allowed for submission by the Director.
44. Under the heading "Perjury/Fraud by VHN" in her submissions, Ms. Braich accuses the Employer, particularly Mr. Moore, of making fraudulent statements that she contends were disproven by the evidence she submitted, including photographs and texts that demonstrate the dates and locations where she performed her duties. She claims that the Employer has stolen most of her receipts, except for a few acknowledged by them, leading to discrepancies in the reported reimbursement amount. Ms. Braich argues that the Employer's misrepresentation of her expenses, including the omission of significant purchases such as used clothing, accessories, and jewelry, has unfairly reduced the amount she is owed. She is in the process of submitting additional documentation to substantiate her claims, including detailed records of her expenditures and travel gas expenses that were initially overlooked by the Director.

45. Under the heading “New Evidence,” Ms. Braich explains that she is submitting new evidence now because she only became aware of Mr. Moore’s response after the Determination was made and wishes to address his additional falsehoods. She says that she will also provide an affidavit from a verifiable witness who supports her claims about the business expenditures she incurred on behalf of the Employer.
46. Regarding the delay in her submissions for the appeal, Ms. Braich notes that due to her rheumatoid arthritis and injuries from a 2020 automobile accident, she faces significant physical challenges that impact her ability to prepare and submit documents promptly. She argues that the extensive time required to prepare her evidence is a direct consequence of the Employer’s dishonesty and the subsequent need to meticulously document and verify her expenditures. Additionally, she contends that her older laptop and cell phone make it exceptionally time-consuming to process all the evidence required to substantiate her case.
47. In her additional appeal submissions dated June 28, 2024, which were sent to the Tribunal in three separate emails, Ms. Braich included the following information that I have carefully examined but do not find necessary to elaborate on further.:
- She comments on Mr. Moore’s letter dated September 6, 2022.
 - She responds to and disputes certain submissions made by Mr. Moore in his letter of August 21, 2023, to the Investigating Delegate.
 - She attaches photographs, taken on various dates in August 2022, showing items and costumes she purchased or created for the Employer, along with associated costs she incurred.
 - She includes work-related text exchanges between herself and a colleague from 2022.
 - She provides work-related emails between herself and her supervisor, Mr. Purdy.
 - She attaches an affidavit from Halley Fulford, who worked for the Employer between August 10, 2022, and September 11, 2022, and offers observations about Ms. Braich and her contributions at work.
48. In her final appeal submissions on July 2, 2024, Ms. Braich sent four emails to the Tribunal. The third email, containing approximately 56 pages, includes photographs of costumes and supplies dated from various times in August 2022, which she claims demonstrate her out-of-pocket expenditures for the Employer that she seeks reimbursement for. In the fourth email, Ms. Braich argues that the Director violated principles of natural justice by insisting that all her evidence be submitted by a deadline she could not meet. She also contends that the Director unfairly favored Mr. Moore’s evidence over hers, based on a discrepancy where she initially reported being ill but later claimed to have worked for 2.5 hours. Ms. Braich attributes this discrepancy to Mr. Moore allegedly stealing receipts that would have verified her work dates. She asserts that, given her comprehensive records, her evidence should be believed over Mr. Moore’s scant evidence.

ANALYSIS

49. Having reviewed the Determination, the section 112(5) record, and Ms. Braich’s submissions, I find the appeal should not be allowed to proceed; it should be dismissed under section 114(1) of the *ESA*. My reasons follow.
50. Section 112(1) of the *ESA* provides that a person may appeal a determination on the following grounds:
- (a) the director erred in law;
 - (b) the director failed to observe the principles of natural justice in making the determination;
 - (c) evidence has become available that was not available at the time the determination was being made.
51. The Tribunal has consistently held that an appeal is not simply another opportunity to argue the merits of a claim to another decision-maker. An appeal is an error correction process, and the burden is on the appellant to persuade the Tribunal that there is an error in the determination under one of the statutory grounds of review in section 112(1).
52. The *ESA* does not provide for an appeal based on errors of fact and the Tribunal has no authority to consider appeals which seek to have the Tribunal reach a different factual conclusion than was made by the Director unless the Director’s findings raise an error of law: see *Britco Structures Ltd.*, BC EST # D260/03.
53. It is also important to note that a party alleging a failure to comply with principles of natural justice must provide some evidence in support of that allegation: see *Dusty Investments Inc. dba Honda North*, BC EST # D043/99.
54. Having delineated some of the relevant principles applicable to appeals, as previously noted, Ms. Braich has checked off the “error of law,” “natural justice,” and “new evidence” grounds of appeal under section 112(1) in the Appeal Form.
55. I will discuss each ground of appeal under separate headings below starting with the error of law ground.

a. Error of law

56. Tribunal jurisprudence regarding error of law is well established. The leading case is *Britco, supra*, in which the Tribunal adopted the following definition of “error of law” set out by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, 1998 CanLii 6466 (BCCA), [1998] BCJ No. 2275 (B.C.C.A.):
1. a misinterpretation or misapplication of a section of the *ESA*
 2. a misapplication of an applicable principle of general law;
 3. acting without any evidence;

4. acting on a view of the facts which could not reasonably be entertained; and
5. adopting a method of assessment which is wrong in principle.

57. Although Ms. Braich does not specifically categorize her submissions under the error of law ground of appeal, as she does with other grounds, it appears she is challenging the adjudicative delegate's findings regarding the hours she worked, the wages she is entitled to, and the business expenses she should be reimbursed for. If there is any error in the calculation of any of these, it may amount to an error of law if the error was made by the adjudicative delegate acting without evidence or based on a view of the facts that could not reasonably be entertained under the test in *Britco*, above.
58. After closely reviewing the record and the appeal submissions of Ms. Braich, I do not find that the adjudicative delegate acted without evidence or based on a view of the facts that could not reasonably be entertained. It was within the adjudicative delegate's discretion to prefer the Employer's evidence or to find Ms. Braich's evidence lacking in making his determinations regarding the hours Ms. Braich worked, the wages she is entitled to, and the business expenses for which she should be reimbursed. I also find nothing in Ms. Braich's submissions engages any other elements of the error of law ground of appeal as defined in *Gemex Developments Corp.*, above. Consequently, I dismiss Ms. Braich's error of law ground of appeal.

b. Natural justice

59. The often-quoted decision of the Tribunal in *Re: 607730 B.C. Ltd. (c.o.b. English Inn & Resort)*, BC EST # D055/05, explains that principles of natural justice are, in essence, procedural rights ensuring the parties have an opportunity to learn the case against them, the right to present their evidence and the right to be heard by an independent decision-maker.
60. In *Imperial Limousine Service Ltd.*, BC EST # D014/05, the Tribunal expounded on the principles of natural justice as follows:
- Principles of natural justice are, in essence, procedural rights ensuring that parties have an opportunity to know the case against them; the right to present their evidence; and the right to be heard by an independent decision maker. It has been previously held by the Tribunal that the Director and her delegates are acting in a quasi-judicial capacity when they conduct investigations into complaints filed under the *Act*, and their functions must therefore be performed in an unbiased and neutral fashion. Procedural fairness must be accorded to the parties, and they must be given the opportunity respond to the evidence and arguments presented by an adverse party (see *B.W.I. Business World Incorporated* BC EST # D050/96).
61. The burden of proving a failure to comply with the principles of natural justice rests on the party making the allegation. In this case, Ms. Braich has not met that burden. She asserts that due to the Employer's alleged "perjury," "fraud," and "dishonesty" during the investigation of her Complaint, as well as their alleged theft of her receipts, she has been forced to meticulously detail and document her evidence. She argues, "I have not seen any rule or law that specifies a rigid cut off timeline for a complainant to provide evidence." Additionally, she contends that if the Employer committed "perjury" and "felonies" in the evidence they presented to the investigating delegate, then natural justice should have allowed whatever time it takes for the victim to prepare submissions in their defense. While she acknowledges receiving some extensions to submit her evidence during the investigation, she claims that she "required additional time to submit the last documentation of

the purchases [she] made for [the Employer],” which was not granted by the investigating delegate. She argues that it was a breach of natural justice by the Director for “insisting on all evidence [to be] submitted by a deadline I could not meet.”

62. It is noteworthy that Ms. Braich was accommodated with multiple extensions to submit her evidence in the investigation of the Complaint. The investigating delegate’s email of March 5, 2024, to Ms. Braich is very informative. I set out the relevant parts verbatim below:

I understand you are requesting a further extension to submit evidence and arguments to support your complaint.

During the course of the investigation, you have been provided multiple opportunities to submit any and all evidence related to your file. Following the issuance of the Investigation Report, you have been provided the following opportunities to submit your evidence:

The investigation report was issued on January 4, 2024.

- On January 24 2024, you requested up to February 5, 2024 to submit further evidence relating to your business expenses.
- On February 7, 2024, you submitted the full evidence document.
- On February 12, 2024 you stated that you will be sending more evidence relating to your hours of work.
- On February 14, you emailed me stating that you will not be able to submit your evidence by 5 pm on that day, but will be submitted (sic) by February 16, 2024. I did not receive the evidence from you by this date.
- On February 20, 2024, I emailed you stating the file was going to be transferred to a decision maker, then you emailed me your work log of hours.
- On February 22, 2024, I emailed you specific questions to be answered regarding your hours with a deadline of February 28, 2024.
- On February 27, 2024, you emailed me to request an extension to March 4, 2024, which I granted.
- On March 4, 2024, you requested another extension to Friday, March 8, 2024.

You filed your complaint with our office on December 18, 2022. You have had since that date to gather and prepare information and evidence to support your complaint, and during the investigation you have been provided multiple opportunities and extensions to provide your evidence and information. I am unable to delay finalizing the investigation any longer. Your request for another extension to submit additional information is denied.

All information has now been cross disclosed to the Respondent. The Respondent is currently being provided an opportunity to review and respond to the hour log you submitted. After I receive their response to your hour log I will be transferring the file to a decision maker who will issue a determination into the matter.

63. Section 2(d) of the *ESA* emphasizes the need for “fair and efficient procedures for resolving disputes”. Deadlines ensure that investigations of complaints and dispute resolutions are conducted within a reasonable timeframe, preventing delays that could disadvantage either party. Without deadlines, disputes might drag on indefinitely, which would undermine the efficiency goal of the *ESA* and potentially cause prejudice to the parties involved.

64. I find that the investigating delegate more than adequately accommodated Ms. Braich, allowing her ample opportunity to present all her evidence before the file was forwarded to the adjudicating delegate. Furthermore, I note that the investigating delegate cross-disclosed the Employer's evidence to Ms. Braich during the investigation of the Complaint, giving her sufficient opportunity to respond. There is no objective basis for concluding that the Director breached natural justice in this case.
65. It is also noteworthy that Ms. Braich continued a similar pattern of delays and requests for multiple extensions of time to submit her arguments and documents in the appeal. Parties are entitled to the timely resolution of their disputes, and Ms. Braich's assertion that she faced a "rigid cut off [date]" for providing evidence during the Complaint investigation lacks merit. In conclusion, I find no objective evidence of a breach of natural justice by the Director in this case and dismiss the natural justice ground of appeal.

(c) New evidence

66. Finally, with respect to the "new evidence" ground of appeal, the Tribunal has discretion to accept or refuse new evidence. When considering an appeal based on this ground, the Tribunal has taken a relatively strict approach to the exercise of this discretion and tests the proposed evidence against several considerations. More particularly, in *Davies and others (Merilus Technologies Inc.)*, BC EST # D171/03, the Tribunal established the following four-part test for admitting new evidence on appeal:
- (a) the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;
 - (b) the evidence must be relevant to a material issue arising from the complaint;
 - (c) the evidence must be credible in the sense that it is reasonably capable of belief; and
 - (d) the evidence must have high potential probative value, in the sense that, if believed, it could, on its own or when considered with other evidence, have led the Director to a different conclusion on the material issue.
67. The requirements above are conjunctive and the Tribunal will rarely accept evidence on appeal that does not satisfy all the requirements.
68. It is also noteworthy that the new evidence ground of appeal is not intended to give a person dissatisfied with the result of a determination the opportunity to submit evidence that, in the circumstances, should have been provided to the Director before the determination was made. The approach of the Tribunal is grounded in the statutory purposes and objectives of fairness, finality and efficiency: see section 2(b) and (d) of the *ESA*.
69. In the present case, I find that the proposed "new evidence" - more pictures of items Ms. Braich allegedly purchased on behalf of and for the Employer, emails and texts with colleagues at work, some additional receipts, new submissions explaining additional expenditures on behalf of the Employer and affidavit evidence of Ms. Fulford - does not satisfy the first requirement in *Davies, supra*, because it is evidence that existed and was available during the investigation of the Complaint and before the Determination was made and could have, with the exercise of due diligence, been

presented to the investigative delegate during the investigation or to the adjudicative delegate before the Determination. As a result, I find the evidence in question does not qualify as “new evidence.”

70. The Tribunal has said on many occasions that a party cannot “lie in the weeds,” fail to properly participate in an investigation, and seek to adduce evidence on appeal which should have been presented to the investigative delegate during the investigation: *Tri-West Tractor Ltd.*, BC EST # D268/96. While Ms. Braich has presented a multitude of reasons, without any objective evidence, why she needed more time to submit her evidence during the investigation of the Complaint (as well in the appeal) including issues with her cell phone and laptop, work deadlines and health reasons, I need not get into that as I find she was afforded more than ample opportunity to present her fulsome evidence in a timely fashion and she failed to do so. An appeal is not an opportunity for a party to have another “kick at the can” and reargue the matter using evidence that could have been produced to the Director during the investigation of a complaint or before a determination is made.
71. In the result, I find there is no cogent basis to interfere with the Determination on any ground of appeal.

ORDER

72. Pursuant to subsection 114(1)(f) of the *ESA*, there is no reasonable prospect that this appeal will succeed and therefore, it is summarily dismissed. Pursuant to subsection 115(1)(a) of the *ESA*, the Determination dated May 2, 2024, is confirmed as issued.

Shafik Bhalloo, K.C.
Member
Employment Standards Tribunal